

January 19, 2006

PRESERVATION-RELATED AND OTHER ISSUES TO BE ADDRESSED IN THE
SECTION 108 STUDY GROUP PUBLIC ROUNDTABLES

The Section 108 Study Group will hold roundtables on **March 8 in Los Angeles** and on **March 16 in Washington, D.C.** Information on how to participate will be published in the Federal Register in February 2006 and made available on the Section 108 Study Group Web site (<http://www.loc.gov/section108>).

The Study Group, convened in April 2005, has to date focused largely on four general areas: (1) eligibility for the section 108 exceptions, (2) exceptions for copies for preservation and replacement purposes, (3) preservation of websites, and (4) access to digital copies outside the premises of libraries and archives. These are the issues to be addressed in the March 2006 roundtable discussions. A more detailed description of the issues follows. Other general topics pertaining to section 108 exceptions – such as making copies upon patron request, interlibrary loan, eReserves and licensing – may be the subject of future public roundtables.

1. Eligibility for Section 108 Exceptions.

Section 108 specifically applies to “libraries” and “archives,” but does not include definitions of either term. Instead, the statute relies on the common understanding of the terms and lays out in subsection 108(a)(2) certain criteria that libraries and archives must meet in order to take advantage of the exceptions.

Definitional Issues

Recently, the terms “libraries” and “archives” have been used by some in an increasingly generic sense to embrace, for instance, online or virtual collections of information, as well as the physical institutions traditionally associated with libraries and archives. It has been suggested that, if section 108 is to be revised, it would be important to further

clarify what types of institutions are covered under section 108. The roundtable discussions will address whether section 108 should include specific definitions of what is meant by “libraries” and “archives” and, if so, which characteristics of these institutions should be included in the definitions.

Non-Profit Mission or Non-Commercial Activity

For instance, should eligible institutions be limited to not-for-profit entities for some or all of the provisions of section 108? The statute currently limits eligibility to reproduction and distribution that is not made for any purpose of direct or indirect commercial advantage – focusing on the activity rather than the nature of the institution. The breadth of this provision’s applicability has not been completely clear, particularly since *American Geophysical Union v. Texaco Inc.*¹ Would there be any benefit to also or instead limit eligibility to institutions that have not-for-profit missions?

Virtual Libraries and Archives

Another important definitional issue is whether “virtual” libraries and archives (*i.e.*, libraries and archives that only provide access electronically and not via physical premises) should be eligible under section 108. What are the benefits of or potential problems with including non-physical libraries or archives within the ambit of section 108?

Museums

Questions have also been raised as to whether other types of institutions should be included under section 108 given the similarity of their missions. Museums, for instance, increasingly provide services and roles that overlap with those of libraries and archives. What are the reasons to expand the scope of section 108 to include, or not include, museums? Are there other types of institutions that also have similar missions that should be considered for inclusion in section 108?

¹ 60 F.3d 913 (2nd Cir. 1994).

Outsourcing

How can the issue of outsourcing be addressed? Nothing in section 108 expressly extends any of the exceptions to outsourced activities, but many libraries and archives do in fact use contractors to provide certain services, including some of the activities that may be covered under section 108. This may be especially true for activities related to the preservation of digital materials. Should libraries and archives be permitted to contract out all or any of the activities permitted under section 108? If so, under what conditions?

Existing Criteria

Last, should the current eligibility criteria set out in subsection 108(a)(2) be retained as-is or revised in any way?

2. Making Copies for Preservation and Replacement Purposes.

Currently, section 108 allows libraries and archives to make up to three copies of unpublished works for preservation purposes. (17 U.S.C. § 108(b).) Libraries and archives can also make up to three copies of published works for replacement purposes, so long as the copy possessed by the library or archive is “damaged, deteriorating, lost, or stolen, or if the existing format in which the work is stored has become obsolete.” (17 U.S.C. § 108(c).) Replacement copies can only be made after the library or archives makes a reasonable effort to determine that “an unused replacement cannot be obtained at a fair price.” (17 U.S.C. § 108(c).) Should these exceptions be revised in any way to address the special characteristics of digital media?

Number of Copies

For instance, does the 3-copy limit make sense in the context of digital media? Given the technical requirements of ensuring the continued integrity and accessibility of material in digital formats, many copies may need to be made simply to preserve or make a replacement of a digital work, without ever even making the work accessible to users.

Would a measure such as “a limited number” (per the existing section 108(f)(3)) or a “reasonable” number be workable if limited to the purpose of the reproduction? Does it make sense to focus on access to and distribution of the copies, or the number of access copies, rather than the total number of copies made?

Need for Up-Front Preservation

Digital works often require more up-front, active preservation, since digital media has shown a tendency to deteriorate and lose its integrity more quickly than analog materials. At the same time, it is often difficult to detect loss of data in digital objects, as their deterioration is not, like that of books, immediately apparent. Moreover, once bits are lost, they are difficult, if not impossible, to restore.² Digital preservationists have commented that they cannot effectively preserve digital materials within the current parameters of the current section 108 exceptions. Indeed, one of the major obstacles to digital preservation cited by those interviewed in drafting the plan for the National Digital Information Infrastructure and Preservation Program³ are the copyright issues – the fact that preservation cannot be conducted without implicating copyright and the lack of any existing exceptions that clearly apply to digital preservation.

Potential Amendments to Subsection 108(c)

To address the potential of loss before a “replacement” copy can be made, should subsection 108(c) be revised to permit the making of such copies prior to actual deterioration or loss? Should concepts such as “unstable” or “fragile” be added to “damaged, deteriorating, lost, . . . stolen, or . . . obsolete” to allow replacement copies to be made when it is known that the media is at serious risk of near-term loss? Should certain particularly fragile or rare analog works also be subject to this type of exception? If such an expansion of 108(c) is deemed important to ensure preservation of certain

² For background on the problems surrounding digital preservation, *see e.g.* JEFF ROTHENBERG, COUNCIL ON LIBRARY AND INFO. RES., AVOIDING TECHNOLOGICAL QUICKSAND: FINDING A VIABLE FOUNDATION FOR DIGITAL PRESERVATION (1999), *available at* <http://www.clir.org/pubs/abstract/pub77.html>.

³ LIBRARY OF CONGRESS, PRESERVING OUR DIGITAL HERITAGE: PLAN FOR THE NATIONAL DIGITAL INFORMATION INFRASTRUCTURE AND PRESERVATION PROGRAM (2002), *available at* <http://www.digitalpreservation.gov/>.

materials, what are the risks to right holders in doing so? How could those risks be minimized or addressed?

Preservation-Only Exception

Because digital objects often require active up-front preservation, should libraries and archives, or certain qualifying preservation institutions, ever be permitted to make preservation-ready versions of digital works upon acquisition? Do the requirements of digital preservation merit crafting a new exception, in addition to section 108(c), to permit the making of “preservation-only” copies of digital materials in a library or archives’ collection - in certain limited circumstances? Such an exception might provide for the up-front preservation of “at-risk” digital materials by certain institutions in limited cases where necessary to ensure that a copy will be preserved - prior to the deterioration or loss of those materials, without requiring a search for an unused copy. How would one craft such an exception to protect against abuse or misuse of the exception as a loophole? How could right holders be ensured that these “preservation” copies would not serve simply as additional available copies in the library or archives’ collections? What would prevent libraries and archives from using this provision to supplant the purchase of additional copies, for instance? What kinds of limits could be imposed on the ability to take advantage of it?

How could such a “preservation-only” exception be sufficiently circumscribed to prevent potential injury to rights holders? For instance, only certain types of institutions (a subset of the libraries and archives eligible generally under section 108) might be qualified – namely those employing best practices for digital preservation or those deemed to be “trusted preservation repositories,” however defined. Since the preservation copies would be intended to serve as “pre-loss” preservation copies and not replacement copies (meaning the originally acquired copy is still in the library’s or archives’ collection), there is no readily apparent rationale for permitting the preservation copies to also be made available to users. Doing so could create a windfall for libraries and archives by allowing them to make additional copies available without purchasing them.

Accordingly, should preservation-only copies be maintained in restricted archives and

kept out of circulation unless or until another exception applies? Should eligible institutions then be required to establish their ability and commitment to retain materials in “dark” or unrestricted archives? Should the exception only apply to a defined subset of copyrighted works, such as those that are “at risk”? If so, how should “at-risk” be defined? Should other limitations be placed on their use? Finally, in order to give practical effect to any of the above exceptions, should libraries and archives be allowed under any circumstances to circumvent anti-copying technological protection measures on digital media?

If only certain trusted preservation institutions were able to take advantage of such an exception, how would it be determined whether any particular library or archives qualifies for the exception? Should there be some sort of accreditation, certification or audit process? Should self-qualification (on the basis of statutory criteria) be permitted or should a trusted third party be responsible for determining eligibility? Are there existing models for third party qualification or certification? How would continuing compliance be monitored? How would those failing to continue to meet the qualifications be disqualified? What would happen to the preservation copies in the collections of an institution that has been disqualified?

If such an exception could be narrowly circumscribed, should it be extended to the making of preservation copies of analog materials? Are there circumstances where such an exception would be justified for making digital preservation copies of analog materials, such as fragile tape, that are at risk of near-term deterioration? Or should it ever apply to the making of analog copies of particularly fragile analog materials? If libraries and archives were ever permitted to make such copies of analog works, should the same conditions apply?

Published versus Unpublished Works

As indicated above, subsections 108(b) and (c) currently contain separate provisions for unpublished and published works, respectively. Should the reasons for maintaining this

distinction be revisited? Are there other instances where published and unpublished works should receive different treatment under section 108?

Section 108(b) currently gives broader privileges for the reproduction and distribution of unpublished works for preservation purposes. Up to three copies can be made for preservation and deposit for research use in another library or archive. There is no requirement that the originally acquired copy be damaged, deteriorating, lost, stolen or in obsolete format, or that an effort be made to find an unused copy.

Unpublished material collected by libraries and archives is frequently one-of-a-kind (or one-of-a-few), and thus is not available in the marketplace. Because there is unlikely to be another copy available if the library or archives' copy is lost or damaged, the public interest in the library or archives' preservation of it may be greater than it would be for a published work. Moreover, there may be less likelihood of economic harm or of displacing a market for the work for many of the kinds of unpublished materials available in libraries and archives (*e.g.*, research data, research papers, private papers and letters). On the other hand, there are classes of unpublished works that are intended to be published or may nevertheless have a potential future market. Should section 108 treat these materials differently from other unpublished materials, and if so, how?

Should section 108 take into account a right of first publication, as outlined in the *Harper & Row* case,⁴ with respect to unpublished works? If so, why and in what manner? Would the right of first publication, for instance, dictate against allowing libraries and archives to ever permit online access to unpublished materials – even with the user restrictions described above? Are there any moral rights related issues that would be appropriate to consider? Are there other characteristics of unpublished materials to consider? Are there any reasons to treat unpublished digital and analog materials differently?

⁴ *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985).

3. Preservation of Websites.

Given the particularly ephemeral nature of websites and their importance in documenting the historical record, should a special exception be created to permit the online capture and preservation by libraries and archives of website or online content? Should such an exception be limited to a class of online content or websites, such as sites that are non-commercial and informational in nature (but not news or other media sites) and made freely available for downloading? Such an exception might be akin in some senses to the current subsection 108(f)(3), which permits libraries and archives to capture off-the-air audiovisual national news programs. In 1976 Congress determined that, given the importance of national news broadcasts and their lack of systematic preservation, libraries and archives should be able to copy them off the air for preservation and lending.⁵ The same might be argued with respect to certain online content, especially where the content is made freely available, without restriction, over public networks.

Library and archive website collections are often acquired by web capture, using internet crawlers. A collection may be focused on a special topic or event, such as an election or a natural disaster. Given the vast quantity of online content available at any given time on a particular topic and the fact that websites are often only retained for a limited period of time, it may be impossible to obtain permissions before the content disappears.⁶ The fact that there may be many rights holders with respect to a given web page or set of pages may further complicate clearance. At the same time, because of the speed with which information can be created and communicated on publicly available networks, the content available online at any given time, particularly in times of exigency, may be a

⁵ See S. Rep. No. 94-473, at 69 (1975).

⁶ See, e.g., Peter Lyman, *Archiving the World Wide Web*, in COUNCIL ON LIBRARY AND INFO. RES. & LIBRARY OF CONGRESS, BUILDING A NATIONAL STRATEGY FOR PRESERVATION: ISSUES IN DIGITAL MEDIA ARCHIVING 38 (2002).

valuable source of the historical record and may not exist elsewhere. Do any of these factors justify special treatment for publicly available online content?

Limitations and Conditions for Website Reproduction

If such an exception were to be adopted, what types of sites or content should the exception be limited to? Does it matter if the content is made freely available, without access restrictions or user registration, for public viewing and/or downloading? Should the terms of a click-through user agreement control? Should there be an opt-out provision, whereby an objecting website or rights holder could request that a particular site not be included? Should site owners or operators be notified ahead of the crawl that captures the site that the crawl will occur? Should robot.txt files or similar technologies that block sites or pages from being crawled be observed? Robot.txt files serve in a sense as “no trespassing” signs and are sometimes used to prevent crawlers from interfering with the operations of a site. A concern that has been noted is the potential for excessive crawling of a site to cause technical problems and disable or otherwise interfere with the functioning of the site. How could an exception that permits unauthorized crawling be crafted to avoid this problem?

Another issue to consider is the fact that proprietary software is often embedded in internet sites. Should the library or archive be permitted to also copy and retain a copy of such software solely for purposes of preserving the site’s original experience (provided no use is permitted other than to display/use the website)?

If libraries and archives were permitted to capture websites in order to preserve them, should there be any restrictions on public access? Should libraries and archives be allowed to make the copies thus captured and preserved available electronically or only on-site? If so, under what conditions? Should the lapse of a certain period of time be required? Should watermarking be required to make clear that captured pages are copies preserved by the library or archive and not from the actual site, in order to avoid confusion with the original site and any updated content?

4. Access to Digital Copies Outside the Premises of Libraries and Archives.

Currently, section 108 requires that libraries and archives that make digital copies for preservation or replacement purposes restrict public availability of those copies to their premises. (17 U.S.C. § 108(b)(2) and (c)(2).) This applies to tangible digital media (*e.g.*, CDs and DVDs) as well as to purely electronic materials (*e.g.*, electronic journals). Members of the library community have commented that a premises-based view of libraries and archives is anachronistic in the digital age. Libraries and archives, say these commentators, cannot adequately serve their patrons if they operate solely as “brick and mortar” institutions. For example, users of research libraries are often geographically diverse, and their work would benefit greatly if they could receive information electronically instead of having to travel to the physical location where the information is located. On the other hand, expanding non-licensed electronic access to digital works presents a very serious concern to publishers, authors, and other rights holders, given the ease of copying and re-transmission of digital media, and the growing availability of and markets for licensed copies in digital form.

User Community Restrictions

Are there conditions under which electronic access to digital copies should ever be permitted under section 108 outside the premises of libraries and archives (*e.g.*, via e-mail or the internet)? If so, what conditions or restrictions should apply? Should remote access be restricted to the library or archives’ “user community”? If so, how should this community be defined for the different types of libraries? To serve as an effective limit, it seems it should meaningfully represent a well defined, actual user body -- rather than the potential user group (*e.g.*, anyone who pays a member fee). Even for university libraries, where a user community might seem naturally circumscribed, there are questions: What about alumni, students on leave, or relatives? Policies would have to be developed to address the parameters of “user community.” Should offsite electronic

access only be available where such a well-defended user community can be shown to exist?

Simultaneous User Restrictions

Another possible way to try to limit off-site use and to approximate the experience of on-premises use would be to limit remote access to a limited number of users at a time. Many licenses to libraries for electronic content already contain such provisions. License fees are often charged based on the number of simultaneous users permitted and a defined user community may also be required. If a limit on simultaneous users is required for off-site access to unlicensed material, what should that number be? Should only one user be permitted at a time for each legally acquired copy?

Use of Access and Copy Controls and User Agreements

Should the use of technological access controls by libraries and archives be required in connection with any off-site access to such materials, such as those required by the TEACH Act (*see* 17 U.S.C. § 110(2))? Whether “user community” or “simultaneous user” restrictions or both were to be required in connection with off-site electronic access, use of technological measures and user agreements to enforce those restrictions would at a minimum seem to be appropriate. Do the relevant provisions of the TEACH Act provide a good model? What experiences have educational institutions had in implementing those provisions? Would it be effective to also require library and archive patrons desiring off-site access to sign or otherwise assent to user agreements prohibiting downloading, copying and downstream transmission?

The above questions are not intended to be comprehensive or exclusive, but are meant to frame the issues and prompt public feedback to the Section 108 Study Group, specifically in connection with the public roundtables to be held in March. The above questions and discussion do not reflect the consensus of the Section 108 Study Group or the opinions of any member or members of the group. This information is provided solely for the purpose of eliciting comment and discussion on the issues. Note that other

general topics relating to existing or potential exceptions and limitations for libraries and archives – such as making copies upon patron request, interlibrary loan, eReserves and licensing – may be the subject of future public roundtables.